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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1230

LA SALLE EXTENSION UNIVERSITY, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-6) is unreported. The order and opinion of the Federal Trade Commission (Pet. App. A9-31) are not yet officially reported.

### JURISDICTION

The order of the court of appeals was entered on October 23, 1973. A petition for rehearing was de-

nied by the court of appeals on November 14, 1973. The petition for a writ of certiorari was filed on February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Trade Commission acted within the scope of its remedial jurisdiction in specifying type-size and frequency requirements for the affirmative disclosure provision in an order designed to offset deception resulting from the offering of courses of study in law by a correspondence school.

2. Whether, on petition for review, the court of appeals should have considered the school's contention, not raised before the Commission, that the order is overly broad because it applies to the school's specialized law courses as well as its generalized courses of study in law.

## STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended (15 U.S.C. 45) is set forth at Pet. App. A33-38.

## STATEMENT

Petitioner ("La Salle") seeks review of a decision by the court of appeals affirming a modification by the Federal Trade Commission ("Commission") of a prior order of the Commission.

La Salle is an Illinois proprietary corporation which operates a correspondence school selling courses

of study and instruction in law and other subjects (App.-1, 67).[1] It offers generalized law courses of three and four years' duration, which until recently led to the conferral of an L.L.B. degree (Pet. 5). Petitioner also offers individual law courses in subjects such as contracts, real estate and insurance, and a hybrid course entitled "First Year Law" (App.-2-A, 179, 181, 289-310; and App.-2-B, 625-626).

In 1954, after full administrative proceedings, the Commission entered a cease and desist order against La Salle, which prohibited La Salle from representing that recipients of its degrees in law or others completing its course of correspondence study will be admitted to or are eligible to participate in bar examinations, unless such representations are expressly limited to specified states where the training requirements are fulfilled solely by completion of a correspondence course of legal study. *La Salle Extension University*, 50 F.T.C. 1083, 1087. The order was based on a finding that, as of 1950, only Montana, Mississippi, Georgia and California accepted correspondence study for bar examination purposes. *Id.* at 1086. Subsequent to the effective date of the 1954 order, however, the rules and laws governing admission to the bar in these four states were modified so that as of 1970 no state, except California under certain circumstances (see App.-1, 24-25), accepted petitioner's courses or degree as sufficient legal edu-

[1] "App." references are to the joint appendix in the court of appeals, consisting of volumes 1, 2-A, 2-B, and 2-C; copies of which we are lodging with the Clerk.

cation or training to qualify a student to take the bar examination (App.-1, 15).

On January 19, 1970, the Commission issued an order to show cause (App.-1, 14) why the 1954 cease and desist order against petitioner should not be reopened, altered and modified pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45 (b). The show cause order set forth an altered and modified cease and desist order which the Commission proposed to issue. It (1) required affirmative disclosure that La Salle's law courses are insufficient education or legal training for purposes of taking a bar examination—with specific type-size and frequency requirements—and (2) prohibited La Salle from offering a law degree (App.-1, 16).

Petitioner answered the order to show cause, opposed the proposed order and requested a hearing (App.-1, 19). At the hearing, numerous witnesses testified that it was their impression on reading La Salle's advertisement that they would be able to take the bar examination or practice law in their respective states upon completing petitioner's law course (App.-1, 24). The hearing examiner found that La Salle's advertisements failed to disclose fully and conspicuously that completion of its course does not qualify anyone to take a bar examination (App.-1, 23-24). He concluded that petitioner's advertising and promotional materials have the tendency and capacity to deceive (App.-1, 27-28). Accordingly, the examiner recommended that the Commission adopt the affirmative disclosure provision of the proposed

order, but recommended against prohibiting La Salle from offering a law degree (App.-1, 28-29).

On cross-exceptions to the Commission, La Salle argued that the type-size and frequency requirements of the affirmative disclosure provisions were "unnecessary and unreasonable" (App.-1, 34-39). With that exception, however, La Salle said it was "concurring in general with the recomended order * * *" (App.-1, 33-34).

The Commission upheld the hearing examiner's determination (Pet. App. A9-20). "Where, as here, the mere offering of the product or service leads to a deception (without further affirmative claims)," the Commission explained, "we believe that it is reasonable and necessary to demand that a disclosure required to dispel the deception be given equal prominence with the offer" (Pet. App. A15-16).[2]

On La Salle's petition for review, the court of appeals affirmed (Pet. App. A1-6). It held that the type-size and frequency requirements were not "outside the range of reasonableness" (Pet. App. A4-5). In response to petitioner's offer to abandon its offering of a law degree (made after the case was pending in the court of appeals), the court reasoned (Pet. App. A3):

> Dropping the references to a law degree would,

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[2] Two of the five members of the Commission, Chairman Kirkpatrick and Commissioner Jones, filed separate opinions. Concurring in the affirmative disclosure requirement of the order, they would also have prohibited the offering of an L.L.B. degree (Pet. App. A21-31).

> we think, change the tone very little. We are far from able to say, as a matter of law, that the probability of misunderstanding would be materially reduced if there were no promise of a degree. The two commissioners who felt that dropping the degree should be part of the solution, supported the requirement of disclosure in any event.

The court declined to consider La Salle's argument that the order is overly broad in its application to petitioner's specialized as well as generalized law courses on the ground that La Salle had "raised no such question before the Commission" (Pet. App. A6).[3]

## ARGUMENT

The decision below is correct and presents no question of general importance warranting review by this Court.

1. La Salle challenges the requirements of the Commission's order (Pet. App. A10) that the requisite affirmative disclosure be made

> in type the same size and appearance as [petitioner's] advertising claims appearing thereon (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein [peti-

[3] The court noted that "the [Commission] proceeding was mainly directed at promotion of the general courses," but it recognized "the difficulty of making a distinction in the order, valid in the future as well as presently, between offerings where deception with respect to eligibility for bar admission will be a problem and those where it will not" (Pet. App. A6).

> tioner's] law courses or law degrees are mentioned and in said promotional material or descriptive brochure on each page on which [petitioner's] law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document * * *.

The deception to be prevented in the present case is serious. As Commissioner Jones in her opinion stated (Pet. App. A31):

> Young students who respond to [petitioner's] advertising will invest both their funds—and more important—three years of their life in pursuing their life's career goal. If any confusion or misunderstanding is generated by [petitioner's] advertising, it may not be until after the expiration of this period of time that students will discover that their financial investment has been for naught and that they are no nearer their career goal than when they started. This is the cruelest hoax of all. * * *

To minimize the risk of such deception, the Commission ordered affirmative disclosure with specific type-size and frequency requirements.[4]

The Commission found that the mere offering of La Salle's law courses, without further affirmative claims, had led to deception (Pet. App. A15). Based

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[4] Such an order is not unprecedented. See *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (C.A. 7); *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 116 F.2d 578, 580 (C.A. 2). In any event, a particular remedy is not invalid because in other cases involving a similar problem the agency has selected narrower relief. Cf. *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 187.

on this finding, the Commission ordered affirmative disclosure in type of the same size and appearance as petitioner's advertising claims.[5] The Commission explained (Pet. App. A16):

> Surely a prospective purchaser is entitled to be informed that the course will not qualify him to take the bar examination in letters equally as large as the letters which we find, on the basis of the record, convey this meaning.

Similarly, the Commission ordered affirmative disclosure on each page where La Salle's law courses are mentioned to protect "not only the most careful and intelligent buyers, but also the 'ignorant, the unthinking and the credulous' who may base their decision to purchase on a cursory perusal of the literature at hand. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 679 (2nd Cir. 1944)" (Pet. App. A18). Some purchasers may not read every page of petitioner's promotional literature, the Commission found, and any page may induce purchase of petitioner's course (Pet. App. A18).[6]

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[5] The order does not require La Salle "to carry the disclaimer in [type] the same size as the largest *heading* appearing on each page * * *" (Pet. 9) (emphasis added). See Opinion of the Commission (Pet. App. A16, n. 1). In this regard, petitioner misconstrues (Pet. 9-10) the advice of the Commission's Compliance Division (App.-2-C, 1070-1075).

[6] Another reason for the Commission's specification of type-size and frequency requirements for written affirmative disclosure was to help offset deceptive oral representations by petitioner's salesmen. See Opinion of the Commission (Pet. App. A19-20).

This Court has recognized that the Commission has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and has stated that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613.[7] In the present case, the type-size and frequency requirements specified by the Commission are reasonably related to the violations found. Although the order may require La Salle to alter the layout of its advertisements,[8] the Commission properly determined that remedy to be "necessary to eliminate the unfair or deceptive trade practices which have been disclosed." *Id.* at 612.

2. Petitioner's belated argument concerning application of the order to its specialized law courses was properly rejected by the court of appeals.

(a) Without specifying the particular language about which it is concerned, petitioner contends that the disclosure requirements of the order unjustifiably

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[7] See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-475; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395.

[8] The Commission found that advertising layouts rarely, if ever, constitute a valuable business asset (Pet. App. A16). Moreover, the Commission noted "that if there is no way to present the claim in a particular medium without making a false representation, the seller must abandon the use of that medium," citing *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, n. 7 (Pet. App. A16).

apply not only to general law study leading to an L.L.B. degree but also to individual and specialized non-degree law courses (Pet. 11). With respect to its failure to make this objection before the Commission, petitioner states that "[t]he determination that the Commission's order required a disclaimer as to courses which were not related to general law study introduced an element of surprise so far as the issues had been delineated and tried before the Hearing Examiner" (Pet. 14), and intimates that this objection did not arise until the matter was "presented for compliance to the Agency staff" (Pet. 13). The record, however, does not support petitioner's suggestion of a belatedly discovered "surprise" interpretation of the order.

Language in two portions of the order provided petitioner with ample notice of the application of the order to petitioner's individual non-degree law courses: (1) the references to LaSalle's "courses of study in law," in connection with all advertising and promotion of which the required disclosures must be made, or (2) the reference to LaSalle's "law courses" as to which mention is made in promotional material or descriptive brochures (as distinguished from advertisements and forms, contracts or similar documents) (Pet. App. A10). Petitioner does not contend that the term "law course" has a narrower meaning than the term "course of study." Nor is it in a position to do so on this record.*

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* As the examiner's decision noted, petitioner's promotional materials have at times used the term "law courses" to en-

In any event, as to neither portion of the order is petitioner in a position to complain. Petitioner's "courses of study in law" were referred to not only in the order finally adopted by the Commission, but also in the Commission's show cause order (App.-1, 15) and proposed modified order (App.-1, 16), and the examiner's recommended order (App.-1, 29). The reference to "law courses" was also included in the examiner's recommended order (*ibid.*) as well as in the Commission's final order.

Moreover, although the examiner's recommended order did not limit its references to LaSalle's "courses of study in law" or "law courses" to those that led to a degree, petitioner made no objection to the Commission as to its scope (App.-1, 30-42), explicitly concurred in that order (with exceptions not presently relevant, see p. 4, *supra*), and, as the court of appeals noted (Pet. App. A6), even included the identical language in its proposed order submitted to the Commission (App.-1, 40).

After the Commission's decision adopting the recommended order of the examiner, petitioner had at least two procedures available under the Commission's regulations whereby it could have presented to the Commission its belated claims concerning application of the order to its non-degree law courses. It could have sought reconsideration of the Commission's decision (based upon "new questions raised by

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brace both its course of study in law leading to an LL.B. degree and its individual non-degree courses (App.-1, 21; see, *e.g.*, CX 40, 78, App.-2-A, 131, 317).

the decision or final order and upon which the petitioner had no opportunity to argue before the Commission" (16 C.F.R. 3.55)), or it could have requested that the proceedings be reopened and the order modified, in the "public interest" or because of "changed conditions of fact or law" (16 C.F.R. 3.71, 3.72)." Petitioner chose, however, to by-pass the Commission entirely on this issue and raised it for the first time in its brief in the court of appeals.

Under the circumstances, the court of appeals properly concluded that petitioner had presented no grounds that would justify the court in setting aside the order upon a ground not raised before the Commission (Pet. App. A6). See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-37; *Moog Indus., Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414.[11] All the bases for petitioner's argument have existed at least since the examiner issued his recommended order, and petitioner has failed to

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[10] Petitioner could also have sought advice from the Commission as to whether a proposed course of action concerning its individual law courses would be in compliance with the order (16 C.F.R. 3.61(d)), if it had any legitimate doubts in that regard.

[11] *Hormel* v. *Helvering*, 312 U.S. 552, relied upon by petitioner (Pet. 14), is distinguishable, as that case involved exceptional circumstances warranting consideration on appeal of an issue not raised before the agency. In *Hormel*, subsequent to the administrative determination but prior to appeal, there had been an intervening decision by this Court interpreting existing law. Application of the new interpretation in *Hormel* materially altered the result.

excuse or justify the belated nature of its attack upon the order.[12]

(b) Petitioner's belated attack on the Commission's order is, in any event, without merit. Among the law courses presently offered by petitioner or among any new law courses which it may offer in the future, there can be no certainty as to which, in its promotional setting, might lead to deception respecting eligibility to take a bar examination.[13] For example, one of the Commission's witnesses testified that after expressing an interest in petitioner's courses in law for police officers and accounting, he was misled into signing up for the L.L.B. course of study in law on the understanding that he would be eligible to take the bar examination (App.-1, 86-91).

As this Court declared in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473:

> [T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has

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[12] Although petitioner contends that some of its concern about other aspects of the order developed in post-order compliance communications with the Commission's staff (see Pet. 7, 9-10), no such contention is made as to the application of the order to single non-degree law courses.

[13] On exceptions to the Commission, La Salle argued successfully, in opposition to the proposed degree-prohibition provision, that the L.L.B. degree was not the principal source of deception. The "confusion," petitioner asserted, was attributable to "[m]any different factors" (App.-1, 47, 51).

traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity. * * * [Footnote omitted.]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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